United States Circuit Court of Appeals

for the Ninth Circuit.

H. C. STRONG,	*Appellant,*	
vs.		No. 2648.
C. A. HOLMES,	*Appellee.*	

IN THE MATTER OF THE PETITION OF H. C. STRONG TO LIMIT HIS LIABILITY FOR CERTAIN CLAIMS MADE AGAINST HIM AS OWNER OF THE STEAMSHIP "ALKI."

Brief of Appelle.

CHAUNCEY L. BAXTER.
J. WILL JONES.
V. A. PAINE.
Attorneys for Appellee.

YERKES PRINTING CO., SEATTLE

United States Circuit Court of Appeals

for the Ninth Circuit.

H. C. STRONG,	*Appellant,*	
vs.		No. 2648.
C. A. HOLMES,	*Appellee.*	

IN THE MATTER OF THE PETITION OF H. C. STRONG TO LIMIT HIS LIABILITY FOR CERTAIN CLAIMS MADE AGAINST HIM AS OWNER OF THE STEAMSHIP "ALKI."

Brief of Appelle.

The above entitled cause comes before this Court upon appeal from the District Court of Alaska. Appellant's petition for limitation of liability was dismissed on the ground that the proceedings should have been brought in the United States

District Court for the District of Washington, Western Division, that being the proper forum.

JURISDICTION—The petition for limitation of liability must be filed in the District Court for the district in which the vessel is already in custody in those cases where the vessel has already been libelled and where owner has not been sued. In those cases *where the vessel has not been libelled, but where the owner has been sued*, the petition should be filed either in the district in which the owner has been sued, or in the district in which the vessel may be at the time of instituting proceedings. This is in accordance with the Supreme Court Rule No. 57 (130 *U. S.* 705). The latter part of this rule specifically designates the district in which an owner, who has not been sued, must file his petition, that is, the district in which the vessel may be. In those instances in which the owner has been sued he must file his petition in that district, or, in the district in which the vessel may be.

"The ship owner has a right to await a suit against him and to set up the statutory limitations of his liability as a defense to any recovery if his vessel and freight are lost, or as a partial defense if the claim exceeds the value of his vessel and her

pending freight at the close of the voyage on which the claim arose. If sued in a state Court, he may set up the statutory limitations of liability as a defense or a partial defense in that Court." *Benedict's Admiralty*, Sec. 524.

The defendant in a suit of this nature may await the termination of suit in said Court and then institute proceedings in admiralty, but if he elects so to do, he should be required to bring his admiralty suit in the same jurisdiction. It would seem a travesty on justice that after termination of the suit in a State Court, the defendant would be permitted to go off to a foreign jurisdiction and there institute proceedings in admiralty to limit his liability. The original judgment in this case was obtained in a suit brought against appellant in the state Courts of Washington. In that action both State and Federal Courts of that State then had concurrent jurisdiction. *Berton vs. Tietjen Drydock Co.*, 219 Federal 764. Where Federal and State Courts have concurrent jurisdiction, the one first acquiring jurisdiction will be permitted to retain it.

"If the owner of a vessel is sued in a State Court for a liability alleged to have resulted from his negligence in the operation of a vessel, he should be permitted to show the value of such vessel and his

respective ownership therein, and the jury should be instructed to find the value of the vessel to the end that the owner should be held answerable to the extent of the value of his interest therein." *Loughlin vs. McCaullat*, 65 Am. St. Rep. 872.

If any such proceedings are begun after the suit is brought, they must be in the same district court as that in which the suit is pending.—*The Alpena*, 8 Federal 285. *The Luckenbach*, 26 Federal 870. *Benedict's Admiralty* (4th Ed.), Sec. 529.

In the Matter of the Phoenix Insurance Co., Petitioner, 118 U. S. 624—30 L. Ed. 280. "What is the 'proper district court' referred to in Rule 54 and contemplated by Rule 56? It is the Court, and only Court, mentioned in Rule 57; namely, the District Court in which the vessel is libelled; or, if she is not libelled, then the District Court for any district in which the owner 'may be sued in that behalf.' There is nothing in these rules which sanctions the taking of jurisdiction by a District Court on a petition under the rules, where that Court could not have had original cognizance in admiralty of a suit *in rem* or *in personam* to recover for the loss or damage involved."

The petition herein fails to state the value of the Steamship "Alki" and of her freight then pending. It must be conceded, however, that the value of the ship was and is many times in excess of the amount of the judgment obtained by Holmes. In

the case of *Shipowners & Merchants Transportation Co. vs. Hammond Lumber Co.*, 218 Fed. 162, the Court says, "Where there is but a single claim against the vessel owner, for which a limitation of liability is sought upon which an action has been brought to recover judgment in the State Court, and the value of the vessel involved largely exceeds the amount of such claim, the proceeding should be dismissed. The object of the acts of Congress for limitation of liability apply only to cases where liability may be limited. Except for that particular purpose it clearly was not the intention of Congress to oust the jurisdiction of other Courts."

In the "Defender", 201 Federal 191, "The proceeding is intended for the purpose of limiting the liability, and this presupposes that the liability to be limited might exceed the limit; that is, that there might be personal liability beyond that of the *res* involved."

The "*Dauntless*", 212 Fed. 455, "Where, in a proceeding for limitation of liability, it appears that there is but a single damage claimant, which is plaintiff in a pending suit against the petitioner in a State Court in which the amount claimed is much less than the appraised value of the vessel offered to be surrendered, the Court may properly dismiss the proceedings as to such claimant and dissolve the order restraining and presenting its action at law." See also the *Defender*, 214 Fed. 316.

"Where there is and can be only a single claimant against a single owner, and when the appraised value of the vessel exceeds many time the sum al-

ready adjudged to be due claimant, the Court may decline to entertain jurisdiction." *Delaware River* Ferry Co. vs. Amos, 179 Fed. 756.

The "*Enterprise*", 196 Fed. 404, "Where suits for damages have been brought against the owner of a vessel in a District Court of the United States, the respondent has submitted to the jurisdiction of the Court and suits have been heard and determined and appeals from the decrees have been taken by the respondent, a District Court of another district is without jurisdiction to entertain a proceeding by such respondent to limit his liability as against the claim so in suit." In conclusion the Court says, "It is alleged in the petition that suit has been brought by the administrator of a decedent arising out of the same accident in the County Court of the City of Memphis, and that still another suit may be brought. This only adds to the reasons for not interfering. All the parties alleged to have been injured are within the jurisdiction of the District Court for the Western District of Tennessee. A complete concourse of all the people having claims can thus be brought within that district. To commence the limited liability proceeding here, hundreds of miles away from the place of accident, would mean to bring the unfortunate people with all their witnesses here at an expense to them which might prevent their coming and be a denial of justice, for the reason that the vessel, after the accident, came away and has chosen not to again return to the jurisdiction where the accident happened. We do not think the rules are ironclad or are intended to do such manifest injustice; but we do believe that they are intended to accomplish just what the Chief Justice said in *Ex Parte Slayton*, 105 U. S. 451, 26

L. Ed. 1066. For the above reasons, we are of the opinion that this Court does not have jurisdiction of the petition for limited liability, but that petitioners must go to the District Court for the Western Division of the Western District of Tennessee to institute their proceedings." "The petitioner might have applied to limit its liability as soon as the claim in question arose, and thus have brought all the issues into the District Court. It did not choose to do so, and left some issue to be decided in the common law Court. It is bound here upon the decision of such issue." *In re Old Dominion S. S. Co.*, 115 Fed. 845; The Captain Jack, 169 Fed. 455.

It is the writer's opinion that the petition in the present proceedings should have been filed in the District Court of the United States for the Western District of Washington, first division, and not in the District Court of the District of Alaska, Division No. 1, at Juneau. Quoting from *Benedict's Admiralty*, Sec. 530, Page 539, after analyzing Rule 57, the text is as follows: "The words in Rule 57 that the petition may be filed in 'the District Court for any district in which the said owner or owners may be sued in that behalf' are broad enough to include any district in which it is possible to bring suit against the owner, *i. e.*, any district in which he may be personally served, or compelled to appear by attachment, and hence that the owner might file the libel in any district in which he is personally present, or in any district in which he has property which might be attached. *But the latter part of the rule precludes such meaning.* Since it specifically

provides the district in which an owner who has not been sued must file his petition, *i. e.*, the district where the vessel may be, and the construction of the whole rule seems to require that the words 'may be sued' in the rule are equivalent to the words 'may have been sued.' "

For a full discussion of the right to maintain a proceeding for the limitation of liability where there is but one claim, and an extensive review of the authorities, see *The Huffmans*, 171 Fed. 455, and the recent case of *White vs. Island Transportation Co.*, 233 U. S., page 346, 56 L. Ed. 993. It being the settled law that proceedings to limit liability may be maintained where there is but one claim, still in that class of cases, where suit has been instituted in the State Court, and defendant has appeared and answered, if he would avail himself of the statute he should be required to do so in that action, so that the question of liability, limitation of liability, and ownership may all be tried out in that action. Were it otherwise, and a second trial could be had between the same parties, involving the same matter, it would be a second trial on the merits, between the same parties, which is not contemplated by the statute and is *res judicata. Gleason vs. Duffy*, 116 Fed. 298. "The object of the acts of Congress

for limitation of liability apply only to cases where liability may be limited. Except for that particular purpose it clearly was not the intention of Congress to oust the jurisdiction of other Courts," *Shipowners & Merchants T. Co. vs. Hammond Lumber Co.*, 218 Fed. 164.

"FREIGHT THEN PENDING" — By the terms "Freight pending" and "Freight for the voyage" as used in Sec. 428, Rev. Stat., is meant the earnings of the voyage, whether for the carriage of passengers or merchandise, or where passengers or freight money is prepaid under contracts upon which they become the absolute property of the ship owner, whether the passage is completed or not, it must be regarded as earned, and must be surrendered by the owner to entitle him to a limitation of liability under the statute for claims growing out of such loss. *La Bourgoyne*, 139 Fed. 433. Affirmed, 1908, 210 *U. S.* 95, 52 L. Ed. 973.

It will be conceded that the value of the ship "Alki" is and was many times greater than the amount of claimant's judgment. Appellant now seeks to escape payment of the judgment by proceedings in this Court to limit liability, setting forth in his petition that his interest in the Steamship "Alki"

was *merely nominal.* No mention whatever is made of "her freight pending" for which he is also liable. All the allegations of the petition are vague and indefinite, and, construed in the most favorable light, are not sufficient to warrant the Court in issuing its mandate herein.

The following is the MEMORANDUM DECISION, filed by Judge Jennings, in this case and has not been included in the Printed Apostles on appeal prepared by appellant. I think the memorandum decision of Judge Jennings should properly come before this Court for its information, and therefore incorporate the same in my brief:

In the Matter of the Petition of H. C. Strong to Limit his Liability for Certain Claims made against him as owner of the Steamship "Alki."	*No.* 1214-*A* *In Admiralty.* *MEMORANDUM DECISION*

On the 25th day of January, 1915, the petition of H. C. Strong in the above entitled matter was filed in this Court.

While a proceeding to limit liability is in the first place usually *ex parte*, yet as the Court had doubt as to its jurisdiction the Court deemed it to be in the interest of justice that the said C. A. Holmes should have notice of the application and accordingly entered the following order:

"The Court being in doubt both as to its jurisdiction in the premises and as to the sufficiency of the allegations and the propriety of granting the relief asked for, and it being unwilling to decide said questions except upon a full presentation of the matter and an opportunity given to the claimant mentioned in said petition to-wit: C. A. Holmes, does now adjourn the hearing of the matters contained in the petition until Monday, the first day of March, 1915, at 10 o'clock A. M., and does direct that notice be given, by the petitioner, to the said C. A. Holmes, or to his attorney in the action of *C. A. Holmes vs. H. C. Strong* (Being No. 1130-A of the files of this Court), that on said date and at the Court House in Juneau, the said petition will be brought on for argument, both as to the jurisdiction of the Court, the sufficiency of the allegations of the petition, and the propriety of granting the relief asked for, at which said time and place he, the said C. A. Holmes, or his attorney, may appear and present such argument and authorities in opposition to the prayer of said petitioner as to him may seem desirable. A copy of said petition shall be served with said notice."

(This was in consonance with the course taken in *The Enterprise*, 196 Fed. 406.)

The claimant Holmes duly appeared and filed a brief in which the following questions were raised:

(1) Jurisdiction of the Court—The claim is made, first, that the petition is not filed in the proper Court; second, that the petition does not state any facts sufficient. We will notice the question of jurisdiction or non-jurisdiction.

In what Court should such a petition be filed?

The 57th Admiralty rule of the Supreme Court is as follows:

"The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which the said ship or vessel may be libelled to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship has already been libelled and sold, the pro-

ceeds shall represent the same for the purposes of these rules."

(130 *U. S.* 705.)

It is not alleged in the petition that the vessel has been libelled at all, and so the inquiry arises, what is meant by the words "in which the owner may be sued in that behalf"?

It seems to me that those words do not mean and cannot mean "in which it is possible for the owner to be sued in that behalf," because it is possible to sue the owner wherever personal service can be had on him; and to say that the words mean that, would be to say that if a casualty occur on a vessel in Florida, the owner may go to the State of Washington and file a petition to limit his liability, although neither the vessel nor its proceeds is in Washington, and altogether neither the owner nor the claimant lives there. Such a construction it seems to me would be absurd. When we reflect that an occurrence such as the one out of which these proceedings arose gives a cause of action against both ship and ship owner, it would seem ~~that an occurrence such as the one out of which~~ that this rule is simply providing for both kinds of action. It uses the very same words, *i. e.*, "may

be", when it talks about libelling a ship, and yet manifestly it means "may have been libelled."

The rule says, "the District Court of the United States in which the said ship or vessel may be libelled," but that that means "may have been libelled" is indicated by the use of the following alternative, viz: "Or if such ship or vessel be not libelled, then in the District Court for any district in which said owner or owners may be sued in that behalf"; that is to say, "the ship may not have been libelled but the owners may have been sued in that behalf," and in such a case as that the proceeding should be in that district in which the owner has been sued in that behalf.

The Enterprise, 196 Fed. 410.

"*In that behalf*" refers to what has gone before in the rule, to-wit: "To answer for any such embezzlement, loss, destruction, damage or injury."

The rule, therefore, is as if it read, "the District Court of the United States in which the ship or vessel has been libeled or if such ship or vessel has not been libeled, then in the District Court for any district in which said owner or owners has been

sued to answer for any such embezzlement, loss, destruction, damage or injury."

THE PETITION.

As there is no allegation that the vessel has been libeled, the next question to be considered is: Where, if anywhere, has the owner been sued "in that behalf," that is, where, if anywhere, has he been sued "to answer for any such embezzlement, loss, destruction, damage or injury"? If he has been so sued in this Court, then the proceedings for limitation of liability may be instituted in this Court.

The allegation is that said Holmes "has, in the Superior Court of King County, State of Washington, secured a judgment on said claim, and in the further prosecution of said claim has secured a judgment in this Court, sitting at Juneau, Alaska."

If the judgment which has been recovered in this Court was recovered in a suit brought on the judgment in the Washington Court it cannot be said to be a suit *in further prosecution of the claim* —on the contrary, it would have been a suit on a contract. The reason of this is that when the judg-

ment was recovered in the Washington Court it merged or extinguished the cause of action—the relations between the parties were no longer affected by the tort sued on in the Washington Court—the relations were changed by the judgment, for the judgment would be considered as a new debt and this new debt is not affected by the character of the old one; although the original tort may have given rise to the Washington judgment, yet that judgment is a contract and hence may be the foundation of an action of debt or of an offset under the statute permitting matters *ex contractu* to be set off (1 *Freeman on Judgments*, 3rd Ed., Sec. 217, 220; 23 *Cyc.*, p. 1549, e..) ; consequently a suit hereon the judgment there would not be a suit "*in that behalf.*"

Such being the case, this Court would have no jurisdiction, because the petition should not have been brought in the jurisdiction "where the vessel had been libelled or where the owner had been sued "*in that behalf.*"

On the other hand, if the judgment referred to as having been rendered in this Court, was not rendered in a suit brought upon the judgment of

the Washington Court but was rendered in a suit on the tort in question, then this might be the proper jurisdiction for the limitation proceeding, because, in such event (no libel having been filed), the proceedings would have been brought in a court where the petitioner had been sued "*in that behalf.*"

Now, there is nothing in the allegation of the petition which would warrant the Court in saying that the judgment alleged to have been recovered in this Court is a judgment brought upon the judgment alleged to have been recovered in the Washington Court. Counsel for the claimant (that is, Holmes), in his argument has made the statement that the judgment of this Court in the case referred to in the petition was in fact a judgment rendered in a suit brought upon the Washington judgment, and he asks the Court to take notice of its own records. The Court cannot do that however, because the judgment referred to was rendered in a case other than the case now before the Court, and the Court does not notice the records of other cases, even though they be in its files.

16 *Cyc.*, p. 918, d.

And yet if the said statement of counsel is

true, then, in the opinion of this Court, this action has been brought in the wrong Court and it would be a waste of time and money, and might result in an unwarranted loss to the claimant to allow petitioner to proceed any further in the matter.

In order to test the jurisdiction of the Court in the first instance, therefore, the claimant will be permitted to file an answer to this petition, in which he may set forth the fact, if it be a fact, that no suit has been brought in this jurisdiction on any claim set forth in the petition: If such answer be filed, there will then be before the Court an issue of fact, upon the determination of which the question of jurisdiction depends. The Court will then try and decide that issue before considering any further steps.

ROBERT W. JENNINGS,

Judge.

In conclusion we wish to say that we have read carefully appellant's brief in support of his appeal herein, and have examined authorities cited, and as stated therein, the determination of the question rests largely upon the interpretation to be given to

Rule 57. The original rule was promulgated by the Supreme Court many years ago. It was amended in 1885 by incorporating into the rule a certain provision to the effect that in cases where ship *had not been libelled* and suit *had not been commenced*, the proceedings to limit liability might be had in the district where the ship *may be*—that is, in the district where the ship was at the time of the filing of the petition. The rule contemplates that proceedings must be instituted "where it (the ship) may be subject to the control of the Court for the purposes of the case." The amendment is a sentence incorporated into the body of the original rule, not changing the first or last part of it. It simply enlarges the rule; does not curtail or change any of its provisions as originally adopted by the Supreme Court. One of the provisions of the rule before and after the adoption of the amendment is to the effect that in all cases where a ship has not been libelled, but the owner has been sued, the petition must be filed in the district where the owner may be sued in that behalf. This clause referred to seems plain and unambiguous. It stands alone and is not affected by the amendments. Judge Blodgett construed it

to mean just what it said, and so expressed the law to be in *The Alpena.* Judge Jennings is clear in his reasoning and follows Judge Blodgett in holding that both proceedings should be in same district.

In the case of *Norwich & N. Y. Trans. Co. vs. Wright*, cited by appellant, that Court was dealing with a case somewhat similar to the one hereunder consideration. In that case a ship was libelled in the Eastern District of New York in an action for damages, *in personam*, wherein judgment was duly recovered. Proceedings to limit liability were thereupon brought in the district of Connecticut. In passing upon the question of jurisdiction in limitation of liability proceedings, the Court says: "The difficulty with the respondents in this case is that they have not taken proper steps, in the proper Courts, to enable them to avail themselves of the benefits of the act. That want of any uniform practices on the subject may, perhaps, be sufficient cause for not having done this. If proceedings are still pending in the Eastern District of New York, it is not yet too late to initiate proper proceedings there for making an apportionment in the case."

In another place the Court says, "If an action

should be brought in the State Court the ship owner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the State Court or procure an order from the District Court to restrain further prosecution of the suit. The Court having jurisdiction of the case, under and by virtue of the Acts of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties."

In the case of *Prov. & N. Y. S. S. Co. vs. Hill Mfg. Co.*, cited by appellant, in passing upon the question of jurisdiction where proceedings to limit liability have been commenced, and as to where would be the proper place to institute such proceedings, the Court says: "When cases arise in which the vessel and freight have been totally lost, and no District Court has or can have possession of any funds to distribute, resort may probably be had with propriety to the District Court of the district in which the owners reside, or where the vessel perished. It will be time enough, however, to consider what is proper in such exceptional cases when they arise." In another place the Court says, "In the

present case, the proper Court undoubtedly was the District Court of the United States for the Southern District of New York, where the remains of the vessel were situated and where suits were brought against the owners."

Viewing the present case from its many different angles, and considering the spirit and intent of Congress in enacting the law, and of the Supreme Court in promulgating the rule, and after reading the numerous authorities cited in our brief, we cannot help but feel that the decision of Judge Jennings is right and equitable and should be sustained.

We therefore respectfully pray that the order of the lower Court be sustained.

CHAUNCEY L. BAXTER.
J. WILL JONES.
V. A. PAINE.